COA No. _____
(Direct Appeal No. 38978-9-II)
Clark County Superior Court No. 07-1-00814-2

IN THE COURT OF APPEALS
DIVISION II

In re the Personal Restraint of:

LESTER JUAN GRIFFIN,

Petitioner.

PERSONAL RESTRAINT PETITION

LESTER JUAN GRIFFIN
Petitioner, Pro Se
Stafford Creek Correction Center
191 Constantine Way
Aberdeen WA 98520

A. STATUS OF PETITIONER

Mr. Lester Juan Griffin applies for relief from confinement. He is presently in custody pursuant to a judgment and sentence in *State v. Griffin*, Clark County Superior Court No. 07-1-00814-2.

B. STATEMENT OF THE CASE

1. Substantive Facts

Just before midnight on May 17, 2008, Gary Atkinson was asleep in his bed when he awoke to a pounding at his front door. RP 95-96. Mr. Atkinson lives in unit A in an apartment complex at 10904 N.E. 48th Street in Vancouver. RP 132-135. Upon hearing the pounding at the door, Mr. Atkinson got out of bed, walked to the front of his home, and opened the door. RP 95-99. As he did, two black men wearing bandana masks on the lower parts of their faces tried to force their way into his apartment. RP 99-102. They were both holding pistols and telling him to get down or they would shoot him. *Id.* Initially, Mr. Atkinson tried to force the door shut as the two men tried to push their way in. RP 99-107. However, realizing that he could not get the door shut, Mr. Atkinson opened the door, and pushed his way out past the two men in order to run to his neighbor's house. *Id.* As he did, he heard two gun shots, one of which he felt hit him in his back. *Id.* Although shot in the back, Mr. Atkinson was able to get to his next door neighbor's house, pound on the door, and enter after he realized that the

door was not locked. RP 108-110. As he entered, his neighbor, who heard the two gunshots, came to the front door and looked out, seeing two masked men fleeing the area. RP 146-152. The neighbor then called 911, as did other neighbor's who also heard the gunshots. RP 146-152, 146-150.

Within a few minutes a number of police officers arrived. RP 132-145. Before the aide cars arrived and took Mr. Atkinson, he told the police that one of the two assailants was an acquaintance by the name of Garry Alexander, whom Mr. Atkinson recognized by his voice and by a small tattoo under his right eye. RP 114, 142-153. Later that evening at the hospital, Mr. Atkinson picked Garry Alexander out of a photo montage and again identified him as one of the assailants. RP 142-143. By the next evening, the police arrested Mr. Alexander and began a number of interrogations with him. RP 388-419.

Although he denied any involvement with the shooting during his first interrogation, during a later interrogation, he told the police that he, Chris Perkins, and the Petitioner, Lester Griffin, had spoken on a number of occasions about robbing Gary Atkinson, whom they believed possessed and sold marijuana. *Id.* According to Mr. Alexander, on the evening of the 17th, the three of them met together at the petitioner's house in order to prepare to perform the robbery. RP 242- 244. Once at the petitioner's house, Alexander got into the back of the petitioner's car, and Mr. Perkins,

who was carrying a pistol, got into the front seat with the petitioner driving. RP 254-258. The petitioner had gloves with him. *Id.* Once out of the apartment complex where he lived, the petitioner pulled into a "*Handy-Andy*" minute mart, where he purchased a beer. RP 260-262. In fact, a little earlier in the evening the three had been in the same minute-mart. RP 244-248. The video surveillance machine from the *Handy Andy* showed the petitioner pulling up in his car just after 11:30 and going in to buy a can of beer. RP 313-348. The same machine also showed the petitioner, Mr. Alexander, and Mr. Perkins together in the store a little earlier buying pepperoni sticks and sodas. *Id.* According to Mr. Alexander's last statement to the police, after buying the beer, the petitioner drove the three of them to the Evergreen Park Apartment complex, which is adjacent to the Apartment complex where Mr. Atkinson lives. RP 260-262. Once at this location, the petitioner and Mr. Perkins got out and retrieved some items from the trunk and then left walking toward Mr. Atkinson's apartment complex. *Id.* Mr. Alexander claimed that the Petitioner had left the key in the ignition, and that the plan was for the petitioner and Mr. Perkins to commit the robbery, while Mr. Alexander waited in the driver's seat to drive the car when they returned. RP 262-263.

The victim in this case was the source of the identification of the first defendant: Mr. Gary Alexander. His identification of Mr. Alexander

was as ***one of the perpetrators who came to his door; not the perpetrator who waited in the car, the one he never saw, heard or interacted with***.

Despite this, Mr. Alexander went on to testify that he "lost his nerve" after the petitioner left, so he drove the car over to his ex-wife's house and called his fiancé to come and get him. RP 264-266. However, prior to her arrival, he changed his mind and drove back to the petitioner's apartment, intent on leaving the car at that location and giving the keys to the petitioner's girlfriend. RP 267-273. Once at the petitioner's Apartment, the petitioner's girlfriend got a call to come and pick up the petitioner at another location. *Id.* When she left to do so, Mr. Alexander claimed that he followed her in his girlfriend's car. *Id.* However, instead of going to the Evergreen Park Apartments, he drove to the Chevron station, where he received a call from the petitioner to come back to the petitioner's apartment. RP 273-278.

In his trial testimony, Mr. Alexander went on to claim that once back at the petitioner's apartment, the petitioner and Mr. Perkins told him that when Mr. Atkinson opened the door to his apartment and saw them with masks and guns, he was able to run through them over to a neighbor's house. RP 276-280. As he did, they both shot, with Mr. Perkins claiming he was the one who actually shot the victim. *Id.* Following this conversation, Mr. Alexander took Mr. Perkins home, and then went to his

girlfriend's house. *Id.* According to Mr. Alexander, he was arrested the next evening. RP 278-281. In fact, the police later executed search warrants at both the petitioner's home, and the home of Mr. Perkins' grandmother, where Mr. Perkins lived. RP 225-232. Although not finding anything of evidentiary value at the petitioner's house, they did find a number of items at Mr. Perkins' house, including a blue bandana, a beanie cap, a black bandana, a black cotton glove, and a printed note saying, "Don't push the alarm. I have. a gun. No sudden moves. Give me all of your money." RP 229-232.

Mr. Atkinson also testified regarding Mr. Alexander being one of the men at his doorway. Mr. Atkinson testified that he "recognized [Mr. Alexander] right away from his eyes . . . and his voice". RP at 102. Especially because "he has a tattoo under his eyes, and that's why [Mr. Atkinson] recognized him." *Id.* When questioned about the veracity of the identification regarding the tattoo, Mr. Atkinson testified, "but I also recognized his voice when he spoke. That's how I know that he's the one that spoke the whole time." RP 114.

The State responded to this testimony with the following closing argument during closing arguments, the prosecution adamantly implored upon the jury that:

> . . . Well, [Mr. Atkinson] certainly when he testified he kn[ew] Gary Alexander's behind this. I mean, he knows

> Garry Alexander's is one of the three charged co-defendants in this. So, he obviously, you know, isn't gonna have any big moral [dilemma] testifying that Garry Alexander is one of them. ***But I submit to you that [Mr. Atkinson's] mistaken as far as who's at the door.***

RP 443 at 21-25, 443 at 1-3. (Emphasis added)

As for testimony and cross-examination, the court limited the cross-examination of Mr. Detective Wilkins, and prevented defense counsel from questioning him about Mr. Perkins assisting the police in locating the glove. RP. 182-184. Defense counsel was literally unable to ask Detective Wilkins a single thing regarding the glove. Counsel also attempted to cross-examine detective Wilkins regarding the conversations he had with Mr. Alexander, and whether or not Mr. Alexander had given him "false stories". RP 408. The court`s response to this was to stop defense counsel from questioning Detective Wilkins any further, along with the admonishment that it is not appropriate to ask a witness to comment on the credibility of another witness. RP 408.

The State sought sentence enhancements so the jury was given special verdict forms for those enhancements. The forms asked the jury to make a special finding of whether the Petitioner was armed with a firearm at the time of the commission of the crime. Jury Instruction No. 2 explained in relevant part:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict.

Appendix A. Likewise, Jury Instruction No. 30 stated in relevant part:

> In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

Appendix B. Defense counsel proposed the same instruction.

In the jury instruction explaining the special verdict forms, (No. 29), jurors were instructed: "[b]ecause this is a criminal case, each of you must agree for you to return a verdict." Appendix C. The jury convicted him of attempted first degree burglary, while armed with a deadly weapon and a firearm, and first degree assault, while armed with a firearm at the time of the commission of the crimes.

Since the Petitioner's case, the Washington State Supreme Court has clarified the law in Washington regarding jury instructions and the unanimity requirement with regard to firearm enhancements in *State v. Bashaw*, 169 Wn.2d 133, (2010).

2. Procedural History

The State charged the Petitioner with (1) attempted robbery in the first degree – RCW's 9A.08.020(3)/9A.56.190/9A.56.200(1)(a)(i)/ 9A.28.020(3)(b); attempted burglary in the first degree, under RCW 9A.28.020(1), (3)(b), RCW 9A.52.020(1)(a) and RCW 9A.08.020(3), while

"armed with a deadly weapon, to-wit: a pistol," under RCW 9.94A.602 and RCW 9.94A.533(3). Clerk's Papers (CP) at 64; and (2) assault in the first degree, under RCW 9A.08.020(3), RCW 9A.36.011 and (1)(a), while armed with a firearm, under RCW 9.94A.602 and 9.94A.533(3), "to-wit: a pistol" (CP at 64.1), and attempted first degree robbery. The state later filed amended information, making some minor changes to the language of charges. CP 63-65.

Prior to trial, both trial counsel for the Petitioner **and** the counsel he replaced specifically made pre-trial requests for the Electronic Surveillance Still Photographs presented to the fact finder during the state's case-in chief. See (RP) 12 at 13-25 and 13 at 1-4; see also (RP) 416 at 12-22. Both the Petitioner's trial counsel and the counsel prior to that had serious issues with the videotape from the *Handy Andy* mini-mart. The videos were ultimately never provided to defense counsel prior to or during trial. As the trial progressed, the prosecution sought to introduce still-photographs of portions of the *Handy Andy* videos to bolster Mr. Alexander's testimony. RP 250. Defense counsel objected to admittance of these photographs because defense counsel did not know who took them, what day they were taken, and no authentication. RP 250. The trial court overruled the objection, finding the photographs went to "weight, not admissibility". RP 250. The prosecution sought to introduce more photographs later. RP 315-

319. Defense counsel objected to the use of photos of portions of the video as opposed to actually using the video. RP320. The grounds were authenticity and best evidence. RP 320, 327. The trial court overruled counsel objections, allowing the state to use only the photographs rather than the actual video. RP 330-333.

Also prior to trial, Mr. Perkins had assisted the police in locating a glove which was later determined to contain the DNA of the Petitioner. RP 72-76. The trial court ruled that this information must be kept from the jury, and only the facts that the glove was found and the DNA appeared to match the Petitioner could be discussed with the witnesses. RP 77.

On February 2, 2009, the parties appeared for trial and began with voir dire. RP 70-72. Following voir dire and opening statements, the state called 15 separate witnesses, including Mr. Gary Alexander. RP 95-419. These witnesses testified to facts contained in the preceding factual history. See "Substantive Facts," *supra*. Following the close of the state's case, the defense rested without calling any witnesses. RP 434. The court then instructed the jury without objection, and the parties presented closing argument. RP 435-495. The jury later returned verdicts of "not guilty" to the charge of attempted first degree robbery, "guilty" to the charge of attempted first degree burglary, and "guilty" to the charge of first degree assault. CP 116-121. The jury also returned special verdicts that the

petitioner was "armed with a firearm" at the time of the commission of the attempted burglary and the assault. *Id.*

At a later sentencing hearing, the defense argued that the court should treat the attempted burglary and the assault as the "same criminal conduct" for the purpose of determining the petitioner's offender score. RP 513-526. The court denied this request, finding (1) the burglary and the assault occurred at different times and did not have the same objective intent, and (2) that even if these two crimes did constitute the same criminal conduct, the court would have exercised its right under the burglary anti-merger statute to treat them as separate offenses. *Id.* Based upon this holding, the court sentenced the petitioner to 35 months for the attempted first degree burglary on a range of 30 to 40 months, and 130 months for the first degree assault on a range of 129 to 171 months. CP 145-158. The court then ordered these two sentences to run consecutively for a total of 165 months, to which the court then added 120 months for the two firearm enhancements, for a total sentence of confinement of 285 months in prison. *Id.* The court did not enter any findings in support of its decision to run to two standard ranges consecutive to each other. *Id.*

Following imposition of sentence, with the assistance of appellate counsel, the petitioner filed an appeal of the lower court judgment under Case No. 38978-9-II. the Petitioner's counsel raised issues of a speedy trial

right violation, a violation of the petitioner's right to self representation, and a violation of the petitioner's right to effective assistance of counsel by the trial court for forcing the petitioner to go to trial with counsel who had a conflict of interest, and a violation of the petitioner's right to be free from double jeopardy because of sentence enhancements which were already elements of the underlying crimes charged.

This Court entered an Order Affirming the Superior Court judgment, and that decision was likewise affirmed by the Washington Supreme Court. The mandate from this Court was issued on December 1, 2010. The petitioner now brings this brief in support of personal restraint petition to vacate the firearm enhancement portion of his sentence based upon the jury instructions related to the firearm enhancement which incorrectly imposed a non-existent unanimity burden upon the jury, and challenge multiple instructions which lowered the prosecutions burden of proof regarding the substantive crimes charged, and a plethora of other state and federal law and constitutional violations.

C. STANDARD OF REVIEW FOR PERSONAL RESTRAINT PETITIONS.

To prevail on a personal restraint petition, an individual must show that he or she is unlawfully restrained. *In re Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4. To establish unlawful restraint, the petitioner must show either a constitutional violation or a violation of the

laws of the State of Washington. RAP 16.4(c)(2), (6); *In re Personal Restraint Petition of Liptrap*, 127 Wn. App. 463, 469, 111 P.3d 1227 (2005). Specifically, petitioner must show either: (1) actual and substantial prejudice arising from constitutional error, or (2) non-constitutional error that inherently results in a "complete miscarriage of justice." *In re Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Finally, in order to prevail in a personal restraint petition, a petitioner must set out the facts underlying the challenge and the evidence available to support the factual allegations. *In re Rice,* 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). Bare assertions and conclusory allegations are insufficient to gain consideration of a personal restraint petition. *Id.* at 886. Regardless of whether the petitioner bases his challenge on constitutional or non-constitutional error, he must state facts on which the claim of unlawful restraint is based and state the evidence available to support the factual allegations; he cannot rely solely on conclusory allegations. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams,* 111 Wash.2d 353, 365, 759 P.2d 436 (1988); *see also In re Personal Restraint of Cook*, 114 Wash.2d 802, 813-14, 792 P.2d 506 (1990). If a petition is based on matters outside the appellate record, a petitioner must show that he has "competent, admissible evidence" to support his arguments. *In re Pers. Restraint of*

Rice, 118 Wash.2d 876, 886, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992).

D. GROUNDS FOR RELIEF AND ARGUMENT

GROUND ONE

THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENTS WHICH VIOLATED MR. GRIFFIN'S RIGHTS TO A FAIR TRIAL AND DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITION AND ARTICLE I, SECTIONS 3 AND 22 OF THE WASHINGTON STATE CONSTITUTION.

Prosecutorial misconduct may deprive the petitioner of a fair trial and only a fair trial is a constitutional trial. *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the petitioner a fair trial guaranteed by the due process clause. *Smith v. Phillips*, 455 U.S. 209, 224 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982); *State v. Weber*, 99 Wn.2d 158, 169, 659 P.2d 1102 (1983). Thus the legal error, if it exists, exists in the fact that petitioner's trial was unfair. *Weber*, at 169.

The ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the petitioner's due process rights to a fair trial. An examination of the record in this case shows the jury may have been affected by the sum effect of the State's multiple

instances of misconduct. In this manner, the Petitioner was denied a fair trial.

The state claimed three men were involved in this incident, with two actually accosting the victim at his home and the third driving a vehicle. RP 239-246, 445-447. The State's theory was that the Petitioner was the man at the victim's home who shot the victim, and that the State's Key Witness, Mr. Gary Alexander, (the Petitioner's co-defendant), was simply driving the getaway vehicle, with no idea of the crimes taking place at the victim's house. Based on this "Griffin did it" theory that the State obtained from Mr. Alexander (who the victim said was actually the one who attacked him), the State charged the Petitioner in this case, (Mr. Lester Juan Griffin) with attempted first degree burglary, attempted first degree robbery, and first degree assault, with firearm allegations in each charge. ***Appendix A.***

Unfortunately for the State, the victim in this case knew this testifying co-defendant very well, and knew him as Gary Alexander. RP 102-103. The victim, (Mr. Atkinson) testified to very specific details supporting his identification of Mr. Alexander as one of the men who attacked him at his home. He was very familiar with Mr. Alexander. RP 113. In fact, Mr. Atkinson was living with the mother of Mr. Alexander's child. RP 111. Mr. Alexander had been to Mr. Atkinson's house at least twenty times, usually to pick up his son. RP 113.

When the attack occurred, he recognized the tattoo underneath Mr. Alexander's eye. RP 102 & 114. He recognized Mr. Alexander's voice. RP 100, 102 & 114. Finally, he described Mr. Alexander as around six feet tall and approximately 230+ lbs. RP 114 & 120. He gave this description of Mr. Alexander as he was describing Mr. Alexander as the first man at the door. RP 114 & 120. The state even had to swallow the following testimony elucidated during direct examination of Mr. Atkinson:

> (Mr. Atkinson)
> A. And I recognized the guy that was speakin'. He said, "Get down. Get down."
> . . .
> A. I recognized [Mr. Alexander] right away from his eyes--
>
> (Mr. Goliki):
>
> Q. Okay.
>
> A. -- and his voice.
>
> Q. His eyes and his voice. Anything else?"
>
> A. Well, he has a [teardrop] tattoo under his eyes, and that why I recognized him
>
> Q. Okay, so you knew him.
>
> A. I knew him.
>
> Q. Okay, who was it?
>
> A. His name was **GARY ALEXANDER**.

RP 100 at 22-23; 102 at 15-20 and 24-25; 103 at 1-2, (emphasis added).

Directly contradicting this, Mr. Alexander testified that he was the driver with only minimal participation in the crime and that the Petitioner and Mr. Perkins were actually the ones who attacked Mr. Atkinson. RP 262-63. Mr. Alexander's testimony was key in achieving a guilty verdict against the Petitioner regarding the burglary and assault charges. Without it, Mr. Alexander himself would be sitting in the Petitioner's position.

Even worse, in exchange for Mr. Alexander's testimony, the state offered Mr. Alexander a "plea agreement". RP 285-87. In this agreement, Mr. Alexander would only be charged with attempted robbery in the first degree, (RP 286), without a firearm enhancement, and the State would recommend a **48 month** sentence. RP 286, 291 This was in sharp contrast to the 137-159 months Mr. Alexander was facing under the original charges. RP 291. The horror of the situation is brought to clear light by simply viewing the fact the Petitioner was **actually sentenced to even more - 285 months.**

Here, the victim identified Mr. Alexander as his assailant, and when questioned, Mr. Alexander identified the Petitioner as the victim's assailant. Not rocket science. For reasons still unknown, the State chose to believe Mr. Alexander instead of the actual victim. This left the prosecution with the unfortunate twist of their star witness, (the Petitioner's co-defendant, Mr. Alexander), having his testimony directly contradicted by the actual

victim's testimony. Convincing the jury to disbelieve the victim while at the same time, believe a convicted felon who is an admitted co-defendant who got an 89-111 month **sentence reduction** in exchange for his testimony against ***both*** co-defendants should have been a tall order for the prosecution. Unfortunately for the Petitioner, rules, procedure, justice, and the core value of innocence itself were, and often are kicked by the wayside during the prosecution of "guilty people" by "the State".

Addressing this gaping chasm between the testimony of Mr. Alexander (the co-defendant) and Mr. Atkinson (the victim) during closing arguments, the prosecution adamantly implored upon the jury that:

> . . . Well, [Mr. Atkinson] certainly when he testified he kn[ew] Gary Alexander's behind this. I mean, he knows Garry Alexander's is one of the three charged co-defendants in this. So, he obviously, you know, isn't gonna have any big moral dilemma testifying that Garry Alexander is one of them. ***But I submit to you that [Mr. Atkinson's] mistaken as far as who's at the door.***

RP 443 at 1-3 and 21-25. (Emphasis added). Through this and other blatant, unwarranted, and borderline actionable misconduct, the prosecution wrenched common sense from the jury to obtain a guilty verdict against the Petitioner.

Winding down this sickly twisted trail of illogic, the prosecution compounded the damaging effects of this by improperly vouching in support of Mr. Alexander and Detective Wilkins' testimony, and using the aura, honor and credibility of the state prosecutor's office itself to bolster

Mr. Alexander's veracity. In doing so, prosecutor Golik abandoned argument and took up the sole charge of engaging in misconduct.

The following portions of the prosecutor's closing argument bring the Petitioner's claims sharply into focus:

> All right. So I encourage you to think about, you know, who a deal should be made wit in this scenario. Certainly not one of the guys at the door that's involved in the actual shooting of the victim, but the driver. That's the guy that makes sense to make a deal with, just like if it's a bank robbery and you have a, you know, a driver and guys that go in and rob the bank, it's most likely the deal would be made with the driver, and that's what happens here.
> . . .
>
> Again, it makes sense to do a deal with the guy that left his co-defendants at the scene. That's the right person to do the deal with.

RP 446-447, 450. The prosecutor's arguments here left no doubt in the jury's mind that they would ***necessarily*** be believing and deciding that the Clark County Prosecutor's Office gave the wrong man a "deal" if they believed the victim and disbelieved the testifying co-defendant.

In *State v. Coleman*, 74 Wn.App. 835, 876 P.2d 458 (1994), the prosecutor presented a short rebuttal closing with the following comments:

> It is your job to apply the facts to the law, and we cannot second guess you, and will not second guess you, and if you determine that the only thing that happened here was a theft then that is your judgment. And you are entitled to make it, but I would suggest to you that to do so you have to do two things. And one is to ignore the actual evidence in front of you, and the second is thereby to violate your [oa]th as jurors.

Coleman, 74 Wn. App. at 838.

The court found the above argument to be improper because it implied that the jury would violate its oath if it disagreed with the State's theory of the evidence. The court relied in part on the Supreme Court's opinion in *United States v. Young,* 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed. 2d 1 (1985), where the Court found it was error for the prosecutor to try to exhort the jury to "do its job." *Id.*

Using the power, authority, and absolute aura of truthfulness and honesty the Clark County Prosecutor's Office possesses to vouch for a testifying co-defendant is misconduct so flagrant and ill-intentioned that no curative instruction could have remedied the prejudice. As the highest Court in our Country has observed:

> a prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to truth the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18-19 (1985). *See also, Sechrest v. Ignacio,* 549 F.3d 789 (9th Cir. 2009). By vouching for the truthfulness of his own unsupported, inaccurate assertions, the prosecutor committed flagrant misconduct. *Cf. United States v. Molina*, 934 F.2d 1440, 1444-45 (9th Cir. 1990) ("As a general rule, a prosecutor may not express . . . belief in the credibility of government witnesses. Such prosecutorial vouching,

which consists of either placing the prestige of the government behind the witnesses through personal assurances of their veracity or suggesting that information not presented to the jury supports the witnesses' testimony, is improper.") (citation omitted).

With the victim identifying the states star witness as the actual perpetrator and the State attempting to get the jury to disbelieve this in order to convict the Petitioner, this misconduct could not have been any more prejudicial. There is simply no doubt the jury was affected by this. All one has to do is look at the guilty verdicts against the Petitioner. Clearly the jury believed Mr. Alexander and disbelieved the victim. The state got the result it wanted, but the path it took squarely violated the Petitioner's right to a fair trial under the State and Federal Constitutions.

After the above, it only gets worse, with several other instances of misconduct taking place during the closing argument. Again, improperly vouching for Mr. Alexander:

> -- the one last thing I think you should really think about as far as is Garry Alexander, you know, really one of the two at the door or is he the getaway driver, you gotta hear Garry Alexander's testimony, you know, you gotta hear him explain what happened. He was cross-examined by Defense attorney. **And I submit to you he does not come off as a stupid man, Garry Alexander doesn't, all right**. And would it make any sense at all for him to go and do a home invasion armed robbery and just have a bandanna like this (counsel off camera), you know, when the victim knows him plain as day.

> I mean, is anybody having a hard time figuring out who I am right now? That -- that's what it would be like (indicating). That would be stupid, **and Garry Alexander's not a stupid guy**. You know, he -- he knows what he's doin' here. He -- you know, he talked about how he's the driver 'cause he's good at runnin' from the police, you know, I mean, he's not -- **he's not a dumb guy. He's a streetwise guy, and he is not gonna be the one out of the three to go to the door when the victim knows him. He's gonna be the driver, all right. It's as simple as that, all right, that makes sense.**

RP. at 444-445. (Emphasis added). If there was any doubt, "All right. You know, something that you can do as jurors is just think about Garry Alexander's testimony. I submit to you that he came across as a forthright witness. He did not hold back." RP. 449, 4-7.

Finally, again during closing argument, the prosecution told the jury:

> The polygraph. Remember, you can look at that contract that the defendant signed, and you can see that throughout that contract it's all hinged on the defendant giving truthful statements that -- at all interviews, pretrial interviews, testimony and in any proceeding in the matter of this defendant and Christopher Perkins. The defendant knows full well, it's very clear on that contract, he can be given a polygraph at any time. If he fails, that could be used against him to pull his deal. He knows that. And he knows that when he's testifying. All right. So you can see that in the contract.

RP 489, lines 4-16.

Couple all this with the reiteration of, and vouching for Detective Wilkens' improper "expert" opinion telling the jury Mr. Perkins and Mr. Alexander have no distinct differences in their voices:

> All right, remember, Detective Wilken testified he's very familiar with Garry Alexander's voice, spent quite a bit of time with him.
>
> Also very familiar with Chris Perkins's voice because he's been, I think he testified about three hours listening to Chris Perkins's voice.
>
> And his testimony was no distinct differences, similar voices. So that would be easy to make that mistake.

RP 443.

"The rule that a prosecutor may not express his personal opinion of the defendant's guilt or his belief in the credibility of witnesses is firmly established." *United States v. McKoy*, 771 F.2d 1207, 1210-11 (9th Cir 1985), see also *United States v. Kerr*, 981F.2d 1050, 1053 (9th Cir 1992) ("A prosecutor has no business telling the jury his individual impression of the evidence.").

Detective Wilkins was never established as a voice analysis expert in this trial. Detective Wilkins improper expert opinion that Mr. Perkins and Mr. Alexander had no distinct differences in their voices was an integral part of the State's concerted effort to get the jury to disbelieve the victim yet believe a testifying co-defendant. The testimony never should have been given, should have at least been objected to, and definitely should not have been reiterated and highlighted by the prosecutor during his closing argument. Again, courts across the country have painstakingly ruled over and over that a prosecutor may not express . . . belief in the

credibility of government witnesses. *See Young, Molina,* and *Ignacio, supra.*

The reason for such judicial holdings is because with this type of misconduct by a prosecutor, a jury may ***disbelieve*** an actual victim's testimony, and **believe** the testimony of a co-defendant who got an 80% reduction in prison time for his testimony directly in exchange for that testimony – essentially what happened in this case.

The deficiencies of defense counsel (explained and argued below) and the improperness of the original testimony aside, every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial. *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969). Highlighting testimony known to be improper, then bolstering that improper and/or illogical testimony with improper, outrageous argument during close can hardly be considered "insuring that an accused receives a fair trial."

What must be coupled with the misconduct borne from closing arguments is the misconduct regarding the evidence used to convince the jury to disbelieve the victim while believing a co-defendant who was testifying in exchange for a considerable sentence reduction. This evidence

was still photographs taken of the computer screen displaying the surveillance video from Handy Andy's, a mini mart type gas station.

Defense counsel objected to the use of photos of portions of the video as opposed to actually using the video. RP 320. The grounds were authenticity and best evidence. RP 327. The trial court overruled counsel objections, allowing the state to use only the photographs rather than the actual video. RP 330-333. This ruling was critical, and the substance of the photos and un-obtained video was in serious question.

The state used the photos to establish a timeline from the store to the victim's house. RP 453. The photos actually only showed the Petitioner coming back to Handy Andy's. The State and Mr. Alexander claimed he was in the back of the car at this time. RP 256-259; 451-452. This was the linchpin of the State's case, and once removed, the whole story shatters apart like a house of glass cards. The affidavit of Mr. Perkins, (attached as Appendix D) is unassailable confirmation of this.

If the Petitioner were the only one in that car the second time, clearly the victim's testimony was correct and it was Mr. Alexander and Mr. Perkins who were involved in the shooting at Mr. Atkinson's house. However, rather than obtain and present the actual video which would clearly show who was or was not in the vehicle at any given time, the state

only presented **photographs of portions** of the video. Even worse, only whatever portions officer Dustin Nicholson chose to photograph. RP 317.

Officer Nicholson claimed that he could not obtain a copy of the actual video for various reasons. 1) the owner of Handy Andy's was not very computer savvy, RP 316; 2) the owner complained it would cost a lot of money for him to make a copy, *Id.*; 3) it was a "private" surveillance system not in control of the police, RP 317; 4) claimed the recording was on a hard drive rather than CD, RP 321; 5) he only contacted the security company in charge of the surveillance video ***one time***, RP 322; 6) the security company wanted to charge the store owner to make a copy and officer Nicholson could not get them to do it at a discount or for free, RP 322.

Claiming a police department cannot obtain surveillance video which is evidence in a shooting case because the security company wants to charge money is simply ridiculous. Having an officer take photographs of only portions of a surveillance video which he determines need to be shown is highly irregular and about the worst way to present evidence. In fact, officer Nicholson admitted there could have been adjustments to the camera during the intervals when he went back and forth to the store to photograph the video. RP 323. He also admitted there could have been additional

images of the parties on that video which he did not capture with the still photo camera. *Id.*

Defense counsel made an objection, but the court ruled the photos were duplicates of the images that the original was showing on the computer hard drive. RP 330. The Court also ruled the photos were authenticated by the officer who took them and Mr. Alexander. *Id.* Despite this huge debacle surrounding the unobtainable video, the prosecutor felt the need to argue to the jury that the *video* helped prove his case. RP 435, 437, 448, 450-453, & 462.

The actual video was never presented because it would have cost money to get it. Despite this fact, the prosecutor felt the need base most of his closing argument on this video which was never obtained or presented at trial. *Belgrade,* 110 Wn.2d at 508. The prosecutor should not have been allowed to argue about video which was never presented.

The state may claim it was presented in the form of photographs, but officer Nicholson admitted the photos were only of whatever portions he chose to photograph, and that there were probably more images with the petitioners on them. RP 323. The improper arguments outlined above, coupled with all the previously argued flagrant and ill-intentioned misconduct of the prosecution in this case require this Court to reverse the Petitioner's convictions. When all the above facts and argument are

considered as a whole in conjunction with the fact the State's key witness was contradicted at trial by the victim, the obvious cumulative, prejudicial effect of the prosecution's misconduct leave no doubt the Petitioner's rights due process and a fair trial were violated, and this Court must reverse his convictions because of such.

GROUND TWO

THE ADMISSION OF STLL-PHOTOGRAPHS FROM THE SURVEILLANCE CAMERA WHICH WERE NOT PROVIDED TO DEFENSE COUNSEL PRIOR TO TRIAL, WHICH DID NOT ACCURATELY DEPICT THE INCIDENT, WHICH WERE MISUSED AND MISCONSTRUED TO SUPPORT THE STATE'S FALSE THEORY VIOLATED THE PETITIONER'S RIGHT TO A FAIR TRIAL UNDER ARTICLE I, § 3 OF THE WASHINGTON CONSTITUTION AND THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION

To lay a proper foundation for the use of video tape for testimonial (as opposed to merely demonstrative) proponent must show that the video in fact shows purposes, the what it purports to show; it must be clear. *State v. Hewett*, 86 Wn.2d 487, 492, n.4 545 P.2d 1201 (1976) (citing *State v. Williams*, 49 Wn.2d 354, 360, 301 P.2d 769 (1956)). During the pre-trial investigation defense counsel requested disclosure of evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Both trial counsel for the Petitioner **and** the counsel he replaced specifically made pre-trial requests for the Electronic Surveillance Still Photographs presented to the fact finder during ,the state's case-in chief. See (RP) 12 at 13-25 and 13 at 1-4; see

also (RP) 416 at 12-22. This was key because the State's witness Mr. Alexander, who the victim identified as one of the person that assaulted him, entered a plea agreement with the state, wherein he was required to testify that it was the Petitioner who assaulted the victim. This despite the fact that the victim himself testified that it was the State's key witness, Mr. Alexander who shot the victim in this case.

However, in accordance with his 48 month plea agreement, Mr. Alexander testified that he was in the back seat of Petitioner's car the night of the assault on the victim. RP 255 at 15-18.

The prosecution requested, and the trial court admitted, the still photographs from the original electronic surveillance from "Handy Andy's" mini-mart to bolster the credibility of Mr. Alexander's story which contradicted that of the victim. Counsel timely objected, arguing that (a) there had been no authentication or foundation to admit these pictures; and (b) the original was never made available for defense review or examination. See (RP) 248 at 14-16; 250 at 9-13. Despite these objections and this argument, the court allowed this evidence into trial.

The Washington State Evidence Rules speak upon the requirement of the original. ER 1002 states in relevant part: "To prove the content of a writing recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by

rules adopted by the Supreme Court of this state or by statute." This goes hand-in-hand with ER 1003- Admission of a duplicate. This rule states in pertinent part: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

GROUND THREE

JUDICIAL BIAS SO INFECTED THE PETITIONER'S TRIAL THAT HE WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 3, 22 AND 23 OF THE WASHINGTON STATE CONSTITUTION.

a. Standard of Review

It is beyond dispute that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). More than thirty years ago, the Sixth Circuit pointedly articulated the proper role of a judge in judicial proceedings:

> One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or

> prejudice in the trial of the case. ***If this basic principle is violated, the judgment must be reversed.***
>
> Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts
> or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial.
> ....
>
> ... The judge should exercise self-restraint and preserve an atmosphere of impartiality. When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored.... "[T]he tribunals of [this country] shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free ... from any `bias or prejudice' that might disturb the normal course of impartial judgment.

Knapp v. Kinsey, 232 F.2d 458, 465-67 (6th Cir), cert. denied, 352 U.S. 892, 77 S.Ct. 131, 1 L.Ed.2d 86 (1956) (citations and emphasis omitted; emphasis added).

b. Improper Restriction of Cross Examination of Detective Wilkins Regarding Previous False Statements of Mr. Alexander

During the pre-trial interviews between Detective Wilkins and Mr. Alexander, Mr. Alexander gave statements which were later contradicted by unassailable facts, his trial testimony, and the trial testimony of others. The

statements specifically concerned the circumstances of the assault on the victim.

The trial court continuously impeded and restricted any efforts of defense counsel to expose Mr. Alexander's story as "false" through the cross examination of Detective Wilkins – the lead officer who conducted the pre-trial interviews on Mr. Alexander and obtained a taped statement from him. The cross-examination which did occur was as follows:

> Q. [Defense Counsel] A false story, [Mr. Alexander] tells you a false story the second time; correct?
>
> A. [Detective Wilkins] He's --
>
> (Interrupting by The Court): I'm sorry, it's not appropriate to ask a witness to comment on the credibility of another witness.

RP 408, Lines 5-10. This interruption and cessation of this line of questioning by the court came *sua sponte*, without any objection or prompting from the prosecution.

Later on in cross, the court interrupts counsel's efforts to expose Mr. Alexander again:

> A. Are you asking after I saw those photos—
>
> Q. After you saw the photos, yes.
>
> A. -- did it support what Mr. Alexander had stated?
>
> Q. Correct.
>
> A. Yes, sir.

Q. So based on those photos alone did you believe that Mr. Alexander was not one of the shooters?

(Interrupting by The Court): I'm sorry, counsel, the personal beliefs of this witness are irrelevant to these proceedings. The jury is the sole judge of what weight to be given the credibility of any witness or the testimony that they give.

RP at 408, lines 5-10.

After laying a foundation of Detective Wilkins knowledge of working with "gangs", his eleven years in the Police Department, including three years with Chicago's PD, and Five years with the Military PD, the trial judge interrupted defense counsel during cross-examination of Wilkins **yet again**, and yet again, **without any prompting or objection from the prosecution:**

Q. Does a teardrop tattoo such as the one that Mr. Alexander has (sic), do you know if it has any special meaning?

A. I don't know. What I could tell you, sir, is in my years of being a police officer there's countless stories that are told amongst gangs, rang --

(Interrupting by The Court): Okey, the answer was he didn't know. NEXT question.

RP at 409, lines 5-12.

During the cross-examination of Detective Wilkins, the trial judge's ruling denied defense counsel the right to impeach the witness concerning

declarations he made during an interview with defense counsel's private investigator:

> MR. VUK.: Were you aware of the fact that Mr. Atkinson was -- or had identified Mr. Alexander as one of the assailants?
>
> DET. WIL.: Yes, sir.
>
> MR. VUK.: (Pause; reviewing notes.) Now, through your investigation, were you aware that Heather Cordova was Mr. Alexander -- or, Mr. Atkinson's girlfriend?
>
> DET. WIL.: Yes, I believe so.
>
> MR. VUK.: And were you aware of the fact that Heather Cordova was also the mother of one of Garry Alexander's children?
>
> DET. WIL.: I became aware of it, yes.
>
> MR. VUK.: And were you aware of the fact that Ms. Cordova had Mr. Atkinson's car and -- and had failed to return it?
>
> DET. WIL.: I may have heard it, but I can't recall specifically if I heard it either from an officer -- officer directly or through reviewing police reports.
>
> MR. VUK.: And do you remember an interview that you had with -- with my investigator, Ron Miller? I think Ron Miller was there, Steve Teply was there.
>
> DET. WIL.: Possi- -- I know I've done several interviews regarding this case. I possibly had an interview with Mr. Miller.
>
> MR. VUK.: Do you recall saying when asked why you did not interview Heather Cordova your response was, quote: "I do not care what Heather Cordova says"?
>
> DET. WIL.: I don't recall saying it, but if it's in the transcript I would agree that I did say it.
>
> . . .
>
> MR. VUK.: And do you see on the transcript there near the bottom where you've indicated – where you say that:
> "I don't care what Heather Cordova says"?

MR. GOLIK: Objection, hearsay and relevance.

THE COURT: Sustained. And, for the record, I sustained on relevance grounds

RP 412-413.

All of these interruptions by the judge and limitations placed upon defense counsel leave no doubt the judicial officer presiding over the Petitioner's trial was "biased". This far surpasses the Petitioner's burden of showing "the appearance of bias."

c. The Trial Court Improperly Limited Cross Examination of Detective Wilkinson Regarding Heather Cordova.

Early on in this case, the Petitioner's previous counsel provided the following facts to support his Motion for Continuance:

> For example, I made the decision this week that we needed to – I needed to interview Heather Cordova which is another – a person in the case but not one being called by the State, I don't think. She has never been talked to by anybody, but it's my opinion we need to get with her, I need to sit down, I need to talk to her about this case 'cause it gives us some – it raises some issues about who allegedly was the driver, who allegedly was the gunman, who allegedly was there.

RP 9-10.

There was evidence that Ms. Heather Cordova, (the victim's girlfriend), and the mother of Mr. Alexander's kids made statements prior to the assault of the victim. The statements were that Mr. Alexander was going to get the victim and that Mr. Alexander was with Ms. Cordova the night of the assault.

Neither of these women was ever interviewed by any defense counsel. Neither of these women was ever interviewed by the prosecution or any police or detectives. Neither of these women ever provided a single piece of testimony during the Petitioner`s trial. The failures of defenses counsel in failing to locate, interview, and call to the stand, these two women who were known to have provided exculpatory information.

d. The trial court`s multiple interruptions of defense counsel during cross-examination without any prompting or objection from the prosecution, taken together, shows judicial bias, or the appearance of judicial bias, which requires the reversal of the Petitioner's convictions.

As shown by the record in this case, the trial court interrupted counsel no less than three times, during crucial questioning, with absolutely no prompting or objection from the prosecution. The repeated interjection of judicial bias in the form of one-sided interruptions and rulings improperly limiting cross examination and favoring the prosecution resulted in an unfair trial for the Petitioner. Counsel labored through this bias all during trial and when questioning every single one of the State`s witnesses.

Thankfully, courts around the country have held that they require not only an absence of actual bias, but an absence of even the appearance of judicial bias. As Justice Frankfurter has eloquently noted:

> In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." 5 The Writings and Speeches of Daniel Webster, 163. The same thought is reflected in a recent opinion by the Lord Chief Justice. A witness in a criminal case had been interrogated by the court in the absence of the defendant. Quashing the conviction, Lord Goddard said: "That is a matter which cannot possibly be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in acting as they did. It may be that they sent for this officer in the interests of the accused; it may be that the information which the officer gave was in the interests of the accused. That does not matter. Time and again this court has said that justice must not only be done but must manifestly be seen to be done. *Rex v. Bodmin*, JJ. [1947] 1 K.B. 321, 325.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 n. 19, 71 S.Ct. 6244, 649 n. 19, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). Because of the fundamental need for judicial neutrality, we hold that the harmless error doctrine is inapplicable in cases where judicial bias and/or hostility is found to have been exhibited at any stage of a judicial proceeding. *Anderson v. Sheppard*, 856 F. 2d 741, 747 (6th Circuit 1988). Although there is no mechanical test for determining when bias and/or hostility exists, when a trial judge exhibits the attitude, demeanor and role of the prosecution throughout the entire trial, it follows that the judgment entered therein must be reversed.

While this may be a harsh result for the prosecution (who obtained a conviction of the wrong individual according to the victim and the right

individual according to the testifying co-defendant who the victim said actually did it), "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who will do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136, 75 S.Ct. at 625 (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1955)).

In essence, the trial court was no longer an impartial or unbiased arbiter, but had from all outward appearances assumed the posture of an advocate. See *Reserve Mining Co. v. Lord*, 529 F.2d 181, 186 (8th Cir.1976) (en banc) ("[w]hen the judge joins sides, the public as well as the litigants become overawed, frightened and confused."). The bias and hostility of the trial court in this case can perhaps be best summed up in his concluding statement to the Petitioner during sentencing:

> I would note that the crimes are close to each other and that ***the allegation is that another person other than Mr. Griffin was the primary actor in the case.***

RP at 528, lines 11-14. "[A]nother person" being Mr. Gary Alexander who only received four years because of his testimony against the Petitioner. Most notably, the Petitioner was sentenced to a total of 285 months, compared to Mr. Alexander's 48 months – a difference of 237 months. For the judge to admit that Mr. Alexander was alleged to be the

principal ***and alleged to be so by the victim*** yet still had Mr. Alexander a four year prison term while leveling the Petitioner's whole life with almost ***twenty-four years*** is unfathomable, unconscionable, outrageous, and is indicative of a trial and sentencing where the judge was flat biased against the persecuted defendant.

GROUND FOUR

> THE TRIAL COURT'S LIMITATIONS ON DEFENSE COUNSEL'S CROSS EXAMINATION OF DETECTIVE WILKINS AND MR. ALEXANDER VIOLATED MR. GRIFFIN'S RIGHT TO CONFRONTATION UNDER SIXTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 22 & 23 OF THE WASHINGTON STATE CONSTITUTION, AND VIOLATED MR. GRIFFIN'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 22 & 23 OF THE WASHINGTON STATE CONSTITUTION.

The highest Court in this country had occasion in *In re Oliver*, 333 U. S. 257 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, ***a right to examine the witnesses against him***, to offer testimony, and to be represented by counsel.

333 U. S., at 273 (footnote omitted, emphasis added). Article I § 22 of our Washington Constitution gives a person accused of a crime the right to

confront the witnesses against him face to face. The right to confront the witnesses necessarily includes the right to cross-examine them. *State v. Temple*, 5 Wn. App. 1,485 P.2d 93 (1971). This is true as well under the Sixth and Fourteenth Amendments to the United States Constitution. *Smith v. Illinois*, 390 U.S. 129, 19 L.Ed.2d 956, 88 S. Ct. 748 (1968). While "the right to cross-examine is not absolute, its denial or significant diminution calls into question the ultimate integrity of the fact-finding process." *Chambers v. Mississippi*, 410 U.S. 284, 295, 35 L.Ed.2d 297, 93 S. Ct. 1038 (1973). An accused person is denied his right to cross-examination if reasonable latitude is not allowed. "Prejudice ensues from a denial of the opportunity to place the witness in [his] proper setting and put the weight of [his] testimony and [his] credibility to a test, without which the jury cannot fairly appraise them." *Alford v. United States*, 282 U.S. 687, 75 L. Ed. 624, 51 S. Ct. 218 (1930); *State v. Temple*, *supra* at 4.

When a particular witness is essential to the state's case, a defendant is given extra latitude in cross-examination to show bias, interest, or motive. *State v. Whyde*, 30 Wn. App. 162, 632 P.2d 913 (1981); *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980); *State v. Roberts*, 25 Wn. App. 830, 61 1 P.2d 1297 (1980); *State v. Peterson*, 2 Wn. App. 464, 469 P.2d 980 (1970); *State v. Tate*, 2 Wn. App. 241, 469 P.2d 999 (1970). It is also reversible error to deny the defense the

opportunity to show the chief prosecution witness is biased through an independent witness. *State v. Spencer,* 111 Wn. App. 401, 45 P.3d 209 (2002); *State v. Jones*, 25 Wn. App. 746, 75 1, 610 P.2d 934 (1980).

As shown above in Ground Three above, the trial court improperly restricted the cross examination of Detective Wilkins concerning previously false statements of Mr. Alexander and how the glove was located. The court also improperly restricted the cross examination of Detective Wilkins regarding Heather Cordova and the statements the Detective made to defense counsel's investigator regarding her.

The trial court's actions in limiting cross examination of both Detective Wilkins and Mr. Alexander worked to deprive the Petitioner of his right to confrontation. Mr. Alexander was the linchpin of the State's case, and his voracity, truthfulness and the jury's belief in such meant the difference between guilty verdicts and not guilty verdicts.

The Petitioner's whole defense rested on the voracity and truthfulness of Mr. Alexander, as the victim's testimony (which contradicted that of Mr. Alexander) actually supported the Petitioner's defense. Thus, the improper limitation described above Regarding Detective Wilkins and Mr. Alexander precluded defense counsel from properly and effectively impeaching Mr. Alexander and bringing forth his previously false statements in front of the jury. This in turn resulted in the

violation of the Petitioner's right to confront Mr. Alexander on this point, his right to bring forth this evidence in front of the jury, and his right to completely present his defense to the jury.

ADDITIONAL GROUND FIVE

THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY THAT ITS SPECIAL FINDING HAD TO BE UNANIMOUS IN VIOLATION OF PETITIONER'S RIGHT TO A FAIR TRIAL UNDER ARTICLE I, SECTIONS 22 & 23 OF THE WASHINGTON CONSTITUTION AND THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, AND HIS RIGHT TO DUE PROCESS UNDER ARTICLE I, § 3 OF THE WASHINGTON CONSTITUTION, AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The State's burden is to prove to the jury beyond a reasonable doubt that its allegations are established. *In re Winship*, 397 U.S. 358, 364 (1970); *See also Sullivan v. Louisiana*, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt); *State v. Bashaw*, 169 Wn.2d 133, 145, (2011). If the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden. *Bashaw*, 169 Wn.2d at 145. To require the jury to be unanimous about the negative -- to be unanimous that the State has not met its burden -- is to leave the jury without a way to express a reasonable doubt on the part of some jurors. *Id.*

In, *Bashaw,* the jury had to determine whether the State had proven a fact giving rise to a sentence enhancement. In explaining the special verdict forms, the trial court gave the standard unanimity instruction. Our Supreme Court held the instruction erroneous for sentencing verdicts and reversed:

> Though unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Id. at 147 (citing *State v. Goldberg*, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003).

The jury instruction issue in this case is a narrow one: when a jury has unanimously found a petitioner guilty of a substantive crime and proceeds to make an additional finding that would increase the petitioner's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final? The Washington State Supreme Court answered this question in *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), and the answer is no. A non-unanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt.

In Goldberg, the petitioner was charged with first degree murder, pursuant to RCW 9A.32.030, with an aggravating circumstance enumerated

in RCW 10.95.020. 149 Wn.2d at 893. The finding of an aggravating circumstance would have increased the maximum penalty to "life imprisonment without possibility of release or parole." RCW 10.95.030(1). The jury in *Goldberg* initially returned a verdict finding the petitioner guilty of first degree murder but answered "no" on the special verdict form asking whether the aggravating circumstance was present. 149 Wn.2d at 891. The judge polled the jury and found that one juror had voted "no" on the aggravating factor. *Id.* The presiding juror informed the judge that there was no reasonable probability of the jury reaching a unanimous agreement within a reasonable time. *Id.* Despite that, the judge ordered the jury to continue deliberations the next day and the jury subsequently returned a unanimous finding that the State had proved the aggravating factor. *Id.* at 891-92.

In resolving the appeal in *Goldberg*, we rejected the parties' framing of the issue as one of jury coercion. *Id.* at 893. Instead, the issue we addressed was "whether unanimity is required" for a special finding increasing the maximum penalty and we held that "it is not." *Id.* We went on to hold that the "jury's [non-unanimous] judgment should have been accepted" and that it was error to order continued deliberations. *Id.* at 894. We concluded by stating, "[i]n sum, special verdicts do not need to be unanimous in order to be final." *Id.* at 895. The rule from *Goldberg*, then,

is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the petitioner's maximum allowable sentence. A non-unanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.

Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, *see Goldberg*, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for a determination on the firearm enhancement. That was error.

However, it is beyond question that erroneous jury instructions are subject to a harmless error analysis. In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.' "*State v. Brown,* 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States,* 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The State may argue that any error in the instruction was harmless, but in this case, the trial court did not even poll the jury to determine if the jurors affirmed the verdict, demonstrating it was unanimous. Even with that, our Supreme

Court has stated that an argument of harmlessness based upon jury polling "misses the point." *Bashaw* at 145, ¶24. The error here was the procedure by which unanimity would be inappropriately achieved. In *Goldberg*, the error reversed by the Supreme Court was the trial court's instruction to a non-unanimous jury to reach unanimity. *Goldberg*, 149 Wn.2d at 893. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.

The result of the flawed deliberative process reveals little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." *Id.* at 891-93. Given different instructions, the jury returned different verdicts. One can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. It cannot be said with any confidence what might have occurred had the jury been properly instructed. There is simply no way for this, or any other Court to conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, the remaining sentence enhancements must be vacated, and the Petitioner remanded back to this Court for resentencing.

The rule adopted in *Goldberg* also serves several important policies. First, Washington Courts have previously noted that "[a] second trial exacts a heavy toll on both society and petitioners by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of petitioners due to the emotional and financial strain of successive defenses." *State v. Labanowski*, 117 Wn.2d 405, 420, 816 P.2d 26 (1991). The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. Courts have also recognized a petitioner's "'valued right' to have the charges resolved by a particular tribunal." *State v. Wright*, 165 Wn.2d 783, 792-93, 203 P.3d 1027 (2009) (internal quotation marks omitted) (quoting *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, the Petitioner is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality. A new trial is unnecessary and this issue can be remedied by simple resentencing.

A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Because the Petitioner suffered through a verdict rendered upon jury

instructions which misstated the unanimity requirements for the special verdict findings, the firearm sentence enhancements on counts 2 and 3 must be vacated and the Petitioner must be remanded back to this Court for resentencing to a term consistent with punishment only for the substantive crimes in counts 2 and 3.

GROUND SIX

THE PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, § 22 OF THE WASHINGTON STATE CONSTITUTION.

a. Standard of Review

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). "Under the sixth amendment to the United States Constitution and article I, § 22 of the Washington Constitution, a petitioner is guaranteed the right to effective assistance of counsel in criminal proceedings." *In re Personal Restraint of* Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (citing *Strickland v.* Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

"To successfully challenge the effective assistance of counsel, [the Petitioner] must satisfy a two-part test. [the Petitioner]

must show that '(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the Petitioner], i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different.'" *Davis*, 152 Wn.2d at 672-73 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

b. The Petitioner's Claim of Ineffective Assistance Precludes The Application Of The Invited Error Doctrine To His Claims Regarding Errors In The Jury Instructions.

Multiple claims advanced herein by the Petitioner are based upon manifest and constitutional errors within the jury instructions. *See* Grounds One and Six, *supra*. However, even worse than failing to object to such erroneous instructions being given to the jury, the Petitioner's counsel actually proposed the defective instructions. The result is that the Petitioner's claims, standing alone, would normally be precluded under the invited error doctrine. See *State v. Neher*, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989) (noting that a defendant cannot set up an error at trial and then complain about it on appeal). However, the invited error doctrine does not bar review of a criminal defendant's claim on appeal that trial counsel's

proposal of an allegedly erroneous instruction constituted ineffective assistance of counsel. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

The Petitioner argued the improperness of instructing the jury on an uncharged alternative in Ground One above. He is also arguing the deficiency of instructions regarding the enhancement. *See* Ground Six, below. However, Washington authority suggests that if the Petitioner's attorney actually proposed the instructions he is now claiming are erroneous, his claims will be denied under the invited error doctrine. *State v. Henderson*, 114 Wn.2d 867,870, 792 P.2d 514 (1990) (emphasis omitted) (quoting *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)).

Unfortunately, the Petitioner did not receive a copy of the instructions his counsel proposed. Thus, even if he had the legal training to evaluate his attorney's proposed instructions, (which he did **not**), he never had the opportunity to question, challenge or object to the instructions his counsel proposed at trial.

Based upon this, the obvious manifest injustice resulting, the plain constitutional error, and the arguments above and below, the Petitioner now asserts his attorney rendered ineffective assistance in proposing the erroneous instructions. As a natural consequence, the prejudice and harm he suffered from the manifest and constitutional errors resulting from

counsel's deficient performance result in an avenue for this Court to avoid foreclosure of his instructional error claims based upon invited error. *See State v. Studd,* 137 Wn.23 353 (The invited error doctrine does not bar review of a criminal petitioner's claim that defense counsel's proposal of an erroneous instruction constituted ineffective assistance of counsel); *See also, State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review); *State v. Rodriguez*, 121 Wn. App. 180, 183-84, 87 P.3d 1201 (2004) (same).

c. Defense counsel rendered ineffective assistance by proposing an instruction which incorrectly instructed the jury that its special finding had to be unanimous.

In Ground Five above, and now in this ineffective assistance claim, the Petitioner raises the claim of the instructions relating to the firearm enhancements being improper because they require the jury to be unanimous in its determination on the firearm enhancements. As shown by *Bashaw, supra,* the challenged instructions were clearly erroneous.

The next relevant question is regarding the prejudice flowing from such actions of counsel. *Strickland* at 695. As shown in "Ground Five" above, the instructional error is both manifest and constitutional. Even more compelling, the Court in *Bashaw* identified the error as "the procedure by which unanimity would be inappropriately achieved," and highlighted "the flawed deliberative process"

resulting from the erroneous instruction. *Bashaw*, 169 Wn.2d at 147. Finally, erasing all doubt, the *Bashaw* court reasoned that the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. *Id.* at 147-48; *see also State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (The "test for determining whether a constitutional error is harmless [is] 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (internal quotation marks omitted) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999))).

The prejudice flowing from council's actions of proposing, and the jury receiving, an instruction which misstated the unanimity requirement is therefore a moot point – prejudice is ***presumed*** axiomatic, o the extent that the error was both manifest ***and*** constitutional prejudice flowing from such actions, when the evidence was hotly contested, the victim's testimony actually exonerated the petitioner, and the most damaging evidence against him was the testimony of a co-defendant. That co-defendant received a drastically reduced sentence, and the ***other*** co-defendant (who never testified) has since sworn under oath that his pre-trial statements were the product of police coercion, that the last time he saw the Petitioner was in the store, and his statements completely exonerate the Petitioner. See "Ground Seven" below, and Appendix D, hereto.

A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt.

Because this Court erred in instructing the jury on the unanimity requirements for special findings, the firearm sentence enhancements on counts 2 and 3 must be vacated, and the Petitioner must be remanded back to this Court for resentencing to a term consistent with punishment only for the substantive crimes in counts 2 and 3.

d. The Petitioner's Attorney Rendered Ineffective Assistance When He Failed to Object to Improper Testimony.

As shown above, detective Wilkens gave an expert opinion on Mr. Alexander and Mr. Perkins' voices sounding very similar. RP 397. This went to the heart of the question at issue in this case: was the victim correct in his identification of Mr. Alexander as one of the men at the house, or was Mr. Alexander correct in his testimony that the Petitioner was one of the men at the house?

ER 704 allows for the admission of an opinion or inference on an ultimate issue that the trier of fact must decide provided that the opinion or inference is otherwise admissible. *Seattle v. Heatley*, 70 Wn. App. 573, 578-79, 854 P.2d 658 (1993). To be otherwise admissible, opinion evidence must also satisfy ER 403, ER 701, and ER 702. *Heatley*, 70 Wn. App. at 579. Here, the detective's trooper's opinion was inadmissible under ER 702 and ER 701.

The court did not state whether it was admitting the detective's opinion as expert or as lay testimony because counsel never even challenged it. "Expert testimony on scientific, technical or specialized knowledge is admissible under ER 702 if it will assist the trier of fact understand the evidence or a fact in issue."[1] *Hiner v. Bridgestone/ Firestone, Inc.*, 91 Wn. App. 722, 734-35, 959 P.2d 1158 (1998) (citing *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994)). ER 702 requires us to make two inquiries: "(i) does the proffered witness qualify as an expert; and (ii) would the proposed testimony be helpful to the trier of fact." *State v. Greene*, 92 Wn. App. 80, 96, 960 P.2d 980 (1998); *State v. Janes,* 121 Wn.2d 220, 235-36, 850 P.2d 495, 22 A.L.R. 5th 921 (1993).

"Practical experience is sufficient to qualify a witness as an expert." *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). The detective here had years of experience, thus, he certainly qualified as an expert for purposes of police procedures. But the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise. *Queen City Farms*, 126 Wn.2d at 103-04.

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[1] ER 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Thus, in *Queen City*, the Supreme Court found the witness' testimony to be "conjecture and speculation." *Queen City Farms*, 126 Wn.2d at 104.

The record here does not indicate that the detective was qualified to testify as an expert on voice analysis. There is no evidence that he had the specialized training or experience necessary to recognize the difference between Mr. Alexander's voice and Mr. Perkins' voice. Assuming it is possible to analyze and differentiate between the voices of Mr. Alexander and Mr. Perkins and that it would be admissible, it was not mentioned here. Consequently, this Court should find there was an insufficient foundation to qualify the detective as an expert for purposes of expressing an opinion as to the similarity of Mr. Alexander and Mr. Perkins' voices. *Queen City Farms*, 126 Wn.2d at 104. An opinion that lacks a proper foundation is not admissible under ER 702. *Heatley,* 70 Wn. App. at 579.

Nor did the detective's opinion satisfy the other requirement of ER 702, that it be helpful to the jury. *See State v. Ellis*, 136 Wn.2d 498, 533, 963 P.2d 843 (1998) (Talmadge J. dissenting). "Generally, expert evidence is helpful and appropriate when the testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party." *State v. Jones*, 59 Wn. App. 744, 750, 801 P.2d 263 (1990) (citing *State v. Cunningham*, 23 Wn. App. 826, 854.598 P.2d 756 (1979), rev'd on other grounds, 93 Wn.2d 823, 613

P.2d 1139 (1980)). Thus, opinion testimony explaining complex or arcane medical, psychological or technical evidence may help the jury. *See, e.g., State v. Avendano-Lopez,* 79 Wn. App. 706, 711, 904 P.2d 324 (1995); *Jones*, 59 Wn. App. at 750-51; *State v. Madison,* 53 Wn. App. 754, 764-65, 770 P.2d 662 (1989). But a lay jury, relying upon its common experience and without the aid of an expert, is capable of deciding whether voices of two people sound similar. See, e.g., *Hiner*, 91 Wn. App. at 735-36. The detective's testimony was not properly admissible under ER 702.

The detective's opinion was not admissible lay testimony under ER 701. A lay witness may give only "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701; *State v. Lewellyn,* 78 Wn. App. 788, 794, 895 P.2d 418 (1995); *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985).

Courts have upheld the admission of the identification of a person from a videotape, *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), *aff'd,* 129 Wn.2d 211, 916 P.2d 384 (1996); *Kinard*, 39 Wn. App. at 874. But courts have held the admission of other lay opinions to be improper, such as a person's mental capacity to enter into a lease, *Carr v. Baking,* 52 Wn. App. 880, 885-86, 765 P.2d 40 (1988); and a jail nurse's opinion as to a petitioner's "diminished capacity" where the nurse lacked personal

knowledge as to whether the petitioner was on drugs at the time of the crime. *State v. Thamert*, 45 Wn. App. 143, 148-49, 723 P.2d 1204 (1986).

The above authorities suggest that when analyzing the admissibility of lay opinion testimony, courts must first determine whether the opinion relates to a core element or to a peripheral issue. Where the opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting the opinion. *State v. Farr-Lenzini*, 93 Wn.App. 453, 462-63, 970 P.2d 313 (1999). Courts also consider whether there is a rational alternative answer to the question addressed by the witness's opinion. In that circumstance, a lay opinion poses an even greater potential for prejudice. *Carr*, 52 Wn. App. at 886.

As stated earlier, Wilkins's testimony was an attempt to get the jury to believe a testifying, deal obtaining co-defendant over the victim. Wilken is not an expert in the field of voice analysis and the applicable evidentiary rules show his testimony should have been excluded, objected to, or not allowed in the first place.

Thus, the Petitioner's counsel rendered deficient performance in failing to object to the testimony by detective Wilken that Mr. Alexander and Mr. Perkins have similar sounding voices. The only issue remaining is what prejudice resulted from counsel's deficient performance. The answer is simple: the jury ended up believing a co-defendant who received a

drastically reduced sentence in exchange for his testimony against both co-defendants, yet disbelieved the victim who fully explained exactly why he ***knew*** Mr. Alexander, a man he was very familiar with, was the man at his door.

e. The Petitioner's Attorney Rendered Ineffective Assistance By Failing to Object to Improper Closing Argument by the Prosecution.

As shown in Ground One above, the prosecutor committed several instances of blatant misconduct during closing arguments. However, not a single one of those instances was objected to by counsel.

As thoroughly explained above, the prosecution argued:

A. The victim was mistaken as to the identity of the man at his door who verbally ordered him on the ground and who shot him, (RP at 1-3 and 21-25;

B. The Prosecutor's Office would only give the deal to the least culpable defendant, and that the jury would have to believe the Prosecutor's Office gave the wrong man a deal to find the Petitioner Not Guilty, (RP 443 at 1-3 and 21-25);

C. Arguing that Mr. Alexander was a real streetwise guy, that he was not "stupid," and that the jury would have to believe that Mr. Alexander was stupid to believe the victim's testimony that Mr. Alexander was at his door;

D. Arguing that Mr. Alexander was forthright and did not hold back, (RP 449, 4-7);

E. Arguing that Mr. Alexander had a "contract" with the prosecutor's office, that the contract contained a clause that Mr. Alexander would be subject to a "polygraph" if he did not testify truthfully. Moreover, that the polygraph could be used to "pull his deal" and that Mr. Alexander knew he had to testify truthfully because of all this, (RP 446, 489);

F. Continuously arguing and referring to "video" which was never even obtained by the police, let alone presented to the jury, which was never provided to any defense counsel, (RP 435, 450, 452-453 and 486);

G. Arguing Detective Wilkins was very familiar with both Mr. Perkins and Mr. Alexander, to the point where he could testify that their voices sounded the same in a clear concerted effort to get the jury to disbelieve the victim and believe the testifying co-defendant, (RP 446-447).

The prosecutor used the power, authority, and perceived aura of justice and truthfulness the Clark County Prosecutor's Office inherently possesses (in the eyes of the general public), when arguing all of this ***without a single objection from defense counsel***. The State improperly

used its position of authority to repeatedly and improperly vouch for and bolster its star witness's testimony, the testimony of Detective Wilkins, and to cast doubt upon the actual victim's testimony. Not a single objection from defense counsel.

These were crucial moments during closing arguments. The continued reference to video which was never even obtained was erroneous and should have been objected to. The outrageous use of the Prosecutor's Office itself to bolster a testifying co-defendant's credibility actually shocks the conscious and defiantly should not have been allowed. It is unfathomable that a counsel learned in the law would fail to object to these occurrences. There is no doubt the failure to object here was deficient performance. Again, looking at the verdict given the facts of this case, the jury necessarily disbelieved the victim, yet believed the testifying co-defendant. Prejudice from the failure to object to improper argument which would tend to make a jury believe a testifying co-defendant over a victim is therefore readily apparent.

f. <u>The Petitioner's Trial Counsel Rendered Ineffective Assistance in Failing to Locate, Interview, and Subpoena for Trial, Ms. Heather Cordova and the Mother of Mr. Alexander's Child</u>.

Under Strickland, counsel has a duty to conduct a reasonable investigation under prevailing professional norms. *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. The defendant alleging ineffective assistance of counsel "'must show in the record

> the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" *In re Pers. Restraint of Hutchinson,* 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (quoting *State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In any ineffectiveness claim, a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments. *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. Inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. *Id.*

In re Elmore, 162 Wn.2d 236, 252, 172 P.33 335 (2007) (emphasis added).

Early on in this case, the Petitioner's previous counsel, Mr. Kurk, provided the following facts to support his Motion for Continuance:

> For example, I made the decision this week that we needed to – I needed to interview Heather Cordova which is another – a person in the case but not one being called by the State, I don't think. She has never been talked to by anybody, but it's my opinion we need to get with her, I need to sit down, I need to talk to her about this case 'cause it gives us some – it raises some issues about who allegedly was the driver, who allegedly was the gunman, who allegedly was there.

RP 9-10.

There was evidence that Ms. Heather Cordova, (the victim's girlfriend), and the mother of Mr. Alexander's kids made statements prior to the assault of the victim. The statements were that Mr. Alexander was going to get the victim and that Mr. Alexander was with Ms. Cordova the night of the assault. The other co-defendant in this case has since written

out an affidavit exonerating the Petitioner, and included statements to the effect that none of the Petitioner's defense counsels ever interviewed or even question Mr. Perkins.

Neither of these women nor Mr. Perkins were ever interviewed by any defense counsel. Neither of these women nor Mr. Perkins were ever interviewed by the prosecution or any police or detectives. Neither of these women nor Mr. Perkins ever provided a single piece of testimony during the Petitioner's trial.

In this case, there were absolutely no witnesses called on behalf of the Defense. Amazingly, the victim in this case provided the most supportive testimony for the Petitioner. The failures of defenses counsel in failing to locate, interview, and call to the stand, these two women who were known to have provided exculpatory information and the other co-defendant who was necessarily the one at the victim's house with Mr. Alexander was deficient performance at its finest. The ensuing prejudice from these types of failures is simply unavoidable.

The Petitioner's counsel rendered deficient performance and the instances were at such crucial moments in trial that there was no escape from the resulting prejudice. This Court should find the Petitioner was denied his right to effective assistance of counsel under the State and Federal Constitution, and reverse his convictions.

GROUND SEVEN

THE NEWLY DISCOVERED EVIDENCE SHOWING MR. GRIFFIN'S ACTUAL INNOCENCE REQUIRES AN EVIDENTIARY HEARING FOR A FACTUAL DETERMINATION ON THE VERACITY AND TRUTHFULNESS OF THE AFFIDAVIT OF CHRISTOPHER PERKINS

Newly discovered evidence justifies vacation of a judgment only if the evidence is material and could not, by due diligence, have been discovered in time to move for a new trial. A claim based upon "newly discovered evidence" may be considered only when the petitioner establishes:

> that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new proceeding.

In re Pers. Restraint of Brown, 143 Wash.2d 431, 453, 21 P.3d 687 (2001) (quoting *State v. Williams*, 96 Wash.2d 215, 222-23, 634 P.2d 868 (1981)). A Petitioner is not entitled to a new trial based upon "'newly discovered evidence'" when that evidence is "'merely cumulative or impeaching.'" *Brown*, 143 Wash.2d at 453, 21 P.3d 687.

The issue before the jury was whether or not the Petitioner was one of the two men at the house, or the man in the car, or not part of this crime at all. Thus, Mr. Perkins' sworn statement that Mr. Alexander's inherently

questionable trial testimony (which contradicted that of the *victim*) was false, is not merely "impeaching." In this close of a case, the affidavit from Mr. Perkins is the unarguable material evidence which more than likely would have changed the outcome of the trial. *See, e.g., In re Pers. Restraint of Rice*, 118 Wash.2d 876, 887, 828 P.2d 1086 (1992) (evidence is material only if there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different).

When considering whether newly discovered evidence will probably change the trial's outcome, the trial court should consider the credibility, significance, and cogency of the proffered evidence. *State v. Barry*, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980). Significantly, the standard is "probably change," not just possibly change the outcome. *Williams*, 96 Wn.2d at 223. "[D]efendants seeking post conviction relief face a heavy burden and are in a significantly different situation than a person facing trial." *State v. Riofta*, 166 Wn.2d 358, 369, 209 P.3d 467 (2009).
There is no question the affidavit of Mr. Perkins satisfies all factors needed for a hearing to evaluate Mr. Perkins' reliability and credibility. First, this was a case where the State's key witness, (Mr. Alexander) was a testifying co-defendant who received a 48 month sentence as opposed to the 285 month sentence the Petitioner received subsequent to Mr. Alexander's testimony. Second, Mr. Alexander's testimony ***directly contradicted that***

of the victim, and the Affidavit of Mr. Perkins falls in line with the testimony of the victim. Underscoring the absurdness of a verdict rendered in favor of the testifying co-defendant version of events as opposed to the victims, the victim in this case maintained that he knew Gary Alexander, that he had recognized his tattoo under his eye, had recognized his voice after Mr. Alexander yelled at him to get down, and that Gary Alexander was the man who came to his house and shot him. The State maintained that the victim must have been "mistaken".

Third, the only physical evidence tying the Petitioner to the crime was a glove with his DNA, which there were serious issues regarding the testing of the glove[2], how it was even located, (allegedly through Mr. Perkins himself), and the other glove that was at his house which the Petitioner received a ***stern*** warning from the trial court for attempting to bring that information in front of the jury as follows:

> THE DEFENDANT: Yeah, I was just askin' 'em what happened to the glove they found in my house that --
>
> THE COURT: I know exactly what you were doing, Mr. Griffin, you were trying to bring in a piece of evidence that you chose not to present during the case itself so that the jury would hear it before they left. It won't occur again.

[2] Through the switching of multiple defense counsel's, Mr. Griffin was never able to obtain his own expert to be present during the State's testing of the glove, or to even double check the State's results.

RP 499. Clearly Mr. Griffin did not understand the rules of the Court cannot be broken, even in an attempt to bring the truth to light.

"[I]n evaluating probative force of newly presented evidence 'the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.'" *Riofta*, 166 Wn.2d at 372 (quoting *Schlup v. Delo*, 513 U.S. 298, 332, 115 S. Ct. 851, 130 L.Ed. 2d 808 (1995)).

Mr. Perkins exculpating evidence viewed in isolation is likely material because it directly states under oath that the Petitioner did not commit the crimes; thus, satisfying the fourth factor. *State v. Scott*, 150 Wn. App. 281, 297, 207 P.3d 495 (2009).

Given all, in accordance with and pursuant to the Petitioner's concurrently filed Motion for Evidentiary Hearing, this Court must remand this case back to the trial court for a hearing to determine the credibility and veracity of the affidavit of Mr. Perkins statements already made under oath.

GROUND EIGHT

TAKEN TOGETHER, THE NUMEROUS ERRORS IN THIS CASE VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS AND RIGHT TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 3 & 21 OF OUR STATE CONSTITUTION.

The cumulative error doctrine mandates reversal when the cumulative effect of non reversible errors materially affects the

outcome of a trial. *State v. Newbern*, 95 Wn.App. 277, 297, 975 P.2d 1041 (1999) (citations omitted).

The Petitioner asserts that if none of the errors raised herein require reversal on their own, taken together, the only option is to vacate the convictions and dispose of this case. The extremely prejudicial nature of the errors described in this brief, coupled with the obvious judicial bias and his counsel's prejudicial, deficient performance violated Petitioner's right to due process and right to a fair trial under Article I, Sections 3, 21 and 22 of the Washington State Constitution and the Fifth, Sixth and Fourteenth Amendment to the U.S. Constitution.

E. REQUEST FOR RELIEF

The Petitioner respectfully requests this Court reverse his convictions for attempted first degree burglary, first degree assault, and the firearm enhancements on both charges, and dismiss this case with prejudice or remand this case back to the Superior Court for a new trial. In the alternative, the Petitioner requests this Court order an evidentiary hearing, (as concurrently motioned for by the Petitioner) where Mr. Perkins can come forward and testify under oath to the statements made in his affidavit.

F. OATH.

After being first duly sworn, on oath, I depose and say that I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true, correct and complete to the best of my firsthand knowledge, understanding and belief.

Dated this ___ day of May, 2011

_____
Lester Juan Griffin
Petitioner, Pro Se

Subscribed and sworn to before me this ____ day of May, 2011.

_____
Notary Public in and for the State of
Washington, residing at_____.
My Commission Expires:_____.